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Ending Mandatory Retirement in Two State Universities

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To Retire or Not?

Retirement Policy and Practice
in Higher Education

Edited by
Robert L. Clark and P. Brett Hammond

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Chapter 7

Ending Mandatory Retirement in Two State Universities

Robert M. O'Neil

Elimination of mandatory retirement in some states and institutions began well in advance of national legislation affecting all higher education. In fact during the 1980s, I served as president of two major research universities that were forced by state law to eliminate any mandatory age for faculty retirement. The experiences in the two states (Wisconsin and Virginia) where I most closely observed “uncapping” were strikingly different. Wisconsin uncapped faculty retirement in 1983 by amending its age discrimination laws. As a result, the cap was lifted not only for University of Wisconsin faculty, but also for faculty at Beloit, Lawrence, Marquette, and the state’s other private institutions (whose administrators were probably unaware of the change until well after it occurred). Maine and Florida were the only other states in which such comprehensive uncapping occurred.

On the fateful day that Wisconsin’s legislature addressed this issue, I had asked for a chance to appear before the relevant state senate committee. Having been invited—more accurately, permitted, after an urgent plea—to testify against the proposed uncapping, I was hardly surprised to find the hearing room filled with senior citizens adamantly opposed to continued forced retirement. In such a setting, it would have been futile (indeed, counterproductive in terms of other university needs and priorities) to have flatly opposed a measure that was certain to pass. Instead, the university asked for two things that were later to be a focus both in Virginia and at the federal level: time for transition and authority to offer age-based retirement incentives. The Wisconsin lawmakers did give a brief grace period before the law became effective, but left the university on its own with regard to incentives.

The Virginia experience was different in every respect. There was no chance to testify; uncapping was done quietly in the budget bill; and the university presidents were simply informed as a courtesy on the eve of passage. The issue there was public employment, so the uncapping spared Wash-

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ington and Lee, Richmond, Hampton, and other private peers. This time there was no grace period; in fact, the effective date was made retroactive as an “emergency” bill. University administrators thus faced the very delicate issue of how to treat senior colleagues who were about to reach 70 and had completed filing their retirement papers before the enactment but after the effective date of the uncapping. In one instance the story had a happy ending. One of our most productive scholars—he still is so to this day—asked to stay and the university was only too delighted to rescind his retirement. For a few other late sexagenarians whose papers had been processed before the effective date of the uncapping, there was no such reprieve.

What the Virginia legislature denied in time they more than made up in authorization of incentives. While the scope of the authority was quite limited—1½ percent of the tenured faculty in any given year—the institutions were given substantial flexibility in designing plans. The University of Virginia was able to base judgments about eligibility not only on the obvious factors of age and length of service, but also on an individualized assessment of relative institutional need by discipline and academic unit. Thus a professor of curriculum and instruction in the Education School might be favored for incentive retirement over a demographically comparable colleague in a higher demand field such as computer science. Though some initially raised concerns about the legality of such a subjective element in the equation, it seems to have stood the test of time and has expanded the utility of an otherwise rather limited incentive program. Any incentive plan that does not take some account of relative need is likely to overshoot the mark.

The federal experience followed close upon Virginia’s uncapping. National uncapping was legislated in 1986, but it was delayed pending the outcome of a National Research Council (NRC) committee study of which I was a member. Committee membership had a Noah’s Ark quality—one person from a senior private institution, one from a community college, one from the health sciences, and a few of us less easily typed. The only standard I could perceive was that each member had to be acceptable to so many organizations—Association of American Universities (AAU), American Council on Education (ACE), American Association of University Professors (AAUP), American Association of Retired Persons (AARP), and many others—that only the bland or the omnicompetent could have survived. Yet the group functioned effectively and well, produced a report on time, said what it needed to say, and dissolved.

Some may still feel the committee was unduly compliant—that it should have fought for an extension of the cap. The committee proceeded on the assumption that it did have a choice, whether or not Congress would have acceded had it reached a different conclusion. In the end, the committee recommended letting the cap expire because we believed that was the right thing to do. Several factors shaped this conclusion. We were genuinely concerned about prolonging the appearance of special pleading by the profes-

sorate, at a time when academics could not be said to be universally popular. We were also persuaded that fears expressed in some quarters about the impact of uncapping had been exaggerated.

While a few institutions might suffer genuine hardship during the period of transition, the experience of uncapped states—Wisconsin being high on the list—suggested that most institutions could cope better than the skeptics and doomsayers had warned. In fact, at only one university—Yale—did more than 75 percent of the tenured faculty remain active until their 70th year, and thus might be presumed to have been involuntarily retired prior to the uncapping (National Research Council 1991). Even at such prestigious places as Michigan and Berkeley these percentages were under 40 percent (National Research Council 1991). In fact, one oddity in the data was the striking similarity of actual retirement patterns at comparable institutions with pension plans as disparate as those at Berkeley (defined benefit) and Michigan (defined contribution). There seemed to be no principled way in which to create an exception or dispensation for a small number of private universities that the NRC committee believed would experience transitional hardship. Also the committee saw no solid reason why universities and their tenured professors should not be treated roughly the same as the rest of society. The group looked closely at data that correlated productivity and age in academe, and found striking differences by discipline. People in the sciences do tend to peak early in publications and discoveries—though it would be quite unfair to infer that even a physicist is no longer useful after 50. The humanities showed a steady rise in published scholarship, into and even beyond their 60s, with some striking evidence of late blooming. In the social sciences, a third and again different pattern appeared: a sort of bimodality, with productivity peaking in the late 20s and 30s and reviving again in the mid- to late 50s, with a slump in early middle age.

In any event, these data suggested the fallacy of the claim that academic institutions needed to send their elder members out to pasture at a predetermined age. So long as there remained ways in which to address special cases—including medical disability as a valid basis for terminating even a tenured appointment, which it has always been—the need for a continued cap simply could not be shown. And while a transitional period might have been helpful to the few most severely impacted institutions, uncapping would surely eventually have come to pass. The most the committee could possibly have done would be to stick a finger in the dike—a step that seemed unwise and unwarranted.

There was one other premise to the committee's conclusion, and here the group may have been naïve. The committee pleaded for Congress to grant flexibility in offering age-based retirement incentives. It noted the precarious uncertainty of the situation with respect to defined contribution plans—even though defined benefit plans seemed to be exempt from age discrimination claims for the offering to their faculties of such creative in-

ductions. It assumed Congress would view this request as a kind of trade-off; in effect, the commission could fully support uncapping if—but only if—it anticipated greater flexibility than a narrow reading of the age discrimination laws then afforded. The subsequent delay in responding to this request was understandable. Congress took the bait and—for a time—left higher education in the trap. But as David Raish (this volume) shows, Congress has now acted to make it easier for faculty and administrators in higher education to design cost-effective retirement incentives.

Another relevant datum here was actual institutional experience. The longest uncapped senior institution, the University of Florida experienced no change in the aggregate or average age of retirement. Also there were two trends among those taking advantage of uncapping: a very small number of people stayed on for a very long time, and a much larger number stayed for a brief time beyond 70—brief in part because they could then say they had made a wholly voluntary choice of retirement date, and in part because of the minimum distribution pension requirements which made that choice less than completely voluntary. Of course, in 1997 Congress changed the minimum distribution requirements, too, so that those who now choose to continue working at the same institution are not required to draw down their retirement savings. To test the possibility that climate and quality of life might have skewed the sample, it was important to turn again to Wisconsin, where by 1991 uncapping had been around for seven years. Happily, the patterns varied little between Madison and Gainesville; similarities among the types of faculties seemed to transcend not only geography, but also dramatic differences in pension plans. On the basis of such admittedly incomplete data as these, it appeared that the sky had not yet fallen where uncapping had been in effect for some time, and that it probably would not fall elsewhere after uncapping.

Some institutions may well have quite different experiences. Some may also be naïve.

There is a related issue, namely that tenure and retirement are linked. Tenure will make implementation of uncapping more difficult for some universities. Even here, it is hard to imagine that a responsible institution without tenure (Hampshire, for example) would be completely free of those constraints. Would the presence of tenure create serious enough problems to justify a continued cap? The NRC Committee, which was composed of administration as well as faculty, was unanimous in its negative response: whatever the complications of tenure, they did not warrant continued mandatory retirement. That is, the committee believed that tenure was not the cause of the problem, nor would its curtailment provide a solution. Rather, it recognized the importance of more rigorous standards in the initial granting of tenure—something we should have been imposing anyway. The committee also acknowledged the value of periodic review for all faculty, tenured or not, though it warned against the abuse of such reviews as a subterfuge for

discrimination on the basis of age or viewpoint. And AAUP standards do not preclude dismissal of tenure faculty for cause, for proven medical disability, or on the basis of demonstrated financial exigency or the bond fide discontinuance of a program or department for educational reasons. Given those recognized alternatives and experience, it seemed that institutions would be able to adapt to the change.

Retirement incentives, valuable though they surely are, should not be viewed as a panacea, but rather as one element in personnel and policy planning. Lawyers are already likely to share this view. The audience for whom this caution should be stressed includes personnel directors, human resource experts, and academic administrators of a more general background. There is a belief that incentives are the cure for whatever problems the ending of mandatory retirement may create. The intervening years have taught us some of the limitations in that assumption. For one, the people we might most hope to encourage to retire are, because of their typically modest salaries, least likely to be induced by such an opportunity. They are also least likely to be able to find supplemental or successor employment prospects to mitigate the loss of income even under a generous incentive program. The professors who find such an option most attractive—indeed, for whom it may be an offer they can't refuse—tend to be the most respected of our colleagues, whom we would least wish to lose.

In this sense, several institutions—perhaps most poignantly the University of California during the final voluntary early retirement program (VERIP) cycles—set out a breakfast for the canary, only to have the cat steal it and then found themselves without cats enough to combat the next invasion of rats and mice. Such experiences heightened the need for creative programs that will in effect create separate feeding stations for the canaries, while the cats keep doing what we want them to do. One attractive approach is the institutional and unit need that was an important part of the University of Virginia retirement incentive program. That one factor, among several, helped to make the incentive program far more efficient than it would otherwise have been. The sole negative effect of Virginia's program was dissatisfaction on the part of a few prospective retirees who were in "low-need" disciplines, and thus could not claim an incentive even though they met the other criteria and would like to have retired early. But that was a small price to pay for being largely spared the agonies of wholesale early exodus of the best and still brightest that many of our sister institutions have encountered. This is but one possible way of tailoring the program better and more precisely to suite the university's need and overall personnel goals.

Conclusion

Uncapping has been very much a part of the higher education vocabulary for at least a decade and a half. Many dreaded it, yet knew it would even-

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tually occur. We have begun to come to terms with it, more easily in some cases, less easily in others—and with great difficulty in certain instances. In sum, we have sought to do our level best to help mitigate the worst effects of what is for some institutions a dramatically changed environment. Lessons from Wisconsin, Virginia, Florida, and other early uncappers have helped us find solutions to these challenges.

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